No. 2980.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
H. S. WHITE, doing business under the name of H. S. White Machinery Company,
Bankrupt.

WILLIAM R. PENTZ, as Trustee in Bankruptcy of the Estate of H. S. White, doing business under the name of H. S. White Machinery Company, Appellant,

vs.

H. S. WHITE, doing business under the name of H. S. White Machinery Company, Bankrupt, Appellee.

BRIEF FOR APPELLEE.

WILDER WIGHT,
Attorney for Bankrupt and Appellee.

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BRIEF FOR APPELLEE.

STATEMENT

The bankrupt regularly made application for his discharge. (Tr. 4). The trustee appeared in opposition thereto. (Tr. 11).

The trustee was not authorized to make this opposition by a vote of the creditors at a meeting called for that purpose, as is clearly required by Section 14b of the Bankruptcy Act.

The trustee did petition to the Court for an order authorizing him to enter his opposition (Tr. 8), and notice of the time and place of the hearing of this petition was sent to the creditors (Tr. 20), and the Referee in Bankruptcy did make such an order (Tr. 19). This much of counsel's statement of facts is true. It is not true that there was a meeting of the creditors at the time and place stated in the notice, or any other time or place. There is no evidence of any such meeting, nor is there evidence that a single creditor responded to this notice. This is positively and emphatically stated, and all of counsel's statements or intimations that there was a meeting of creditors or creditors present at the time of the hearing of this petition are entirely unwarranted by any evidence whatsoever.

The hearing was referred to the Referee to ascertain and report the facts. At the very inception of this hearing the bankrupt made objection that it should not be proceeded with on the ground that the trustee was not a proper party in interest, he never having been authorized by the creditors to oppose the discharge as is required by the Act (Tr. 20).

The objection was overruled. Evidence was taken

and the Referee as a Special Master reported recommending that the discharge be denied.

When this report came before the District Court for confirmation the point was again raised. Attention was called to the fact that neither the specifications alleged nor the evidence showed that the trustee was a proper party in interest, and motion was made that the discharge be granted on the ground that the opposition, being invalid, should be disregarded, and the Court so ordered. The discharge was granted then and there, and not after the denial of the trustee's motion to vacate the judgment, as counsel states.

Then counsel for the trustee made his motion to vacate the judgment granting the discharge, and in his supporting affidavit is the first intimation that there was in fact a meeting of creditors and in fact an authorization to the trustee by them. Before this affidavit nothing, either in the specifications by way of allegation, in the evidence anywhere, or in the records or files.

The question presented for this Court to determine is whether, in view of the record on appeal, the judgment granting the bankrupt a discharge is a proper or an erroneous judgment, and this does not include a review of any of the proceedings had after judgment.

I.

NO APPEAL HAS BEEN TAKEN FROM THE ORDER DENYING THE TRUSTEE'S MOTION TO VACATE THE JUDGMENT OF DISCHARGE.

By far the greater part of counsel's brief is devoted to the claimed error of the District Court in denying the trustee's motion to vacate the discharge.

Counsel has, however, taken no appeal from this order. His petition for appeal states that he appeals from *the judgment of the Court granting the bankrupt a discharge.* (Tr. 93).

An order denying a motion to vacate a judgment is an order made after judgment, and must, to be reversed or set aside, be appealed from, *provided always there is an appeal.*

In the present case no appeal has ever been taken. The trustee has appealed from the judgment of discharge and from that only; and that appeal has been allowed and that only (Tr. 93).

II.

THERE IS NO APPEAL FROM AN ORDER DENYING A MOTION TO VACATE A DISCHARGE IN BANKRUPTCY.

Section 25a of the Bankruptcy Act enumerates what

appeals may be taken in bankruptcy cases; and these appeals and no others can be taken.

Thompson vs. Mauzy, 174 Fed. 611.

No appeal from an order refusing to vacate a discharge is mentioned.

III.

THE DENIAL OF THE MOTION TO VACATE THE DISCHARGE WAS EMINENTLY PROPER ON THE MERITS.

A. The Grounds of the Motion Are Entirely Untenable.

The ground upon which the trustee based his motion to vacate, as stated in his notice of motion, was that he was in fact duly authorized to oppose the discharge and the failure of the Referee in Bankruptcy to so find was due to excusable neglect on his part (Tr. 68).

There is no evidence in the record of any such authorization. This is unequivocally stated.

The ground of his motion is then, that the Referee in Bankruptcy, through excusable neglect, failed to find as a fact *something of which there is absolutely no evidence.*

B. No Showing Was Made In Support of the Motion.

Where, in a motion to vacate a judgment, counter affidavits denying the affidavits in support of the motion are filed, as there were in the case at bar (Tr. 86), the facts stated in support of the motion must be established by a preponderance of the evidence, and the burden is upon the moving party.

23 Cyc. 960.

There was absolutely no showing made in the case at bar. The affidavits filed in support of the motion, being denied, avail nothing. The facts claimed should have been proved. There should have been a showing made.

There was absolutely none.

A motion to vacate is addressed to the sound legal discretion of the trial judge, and his decision can be disturbed only for a manifest abuse of that discertion.

23 Cyc. 895.

Is it claimed that the trial Court in the case at bar was guilty of an abuse of discretion in denying the motion to vacate the discharge which was supported by no showing, and made on the ground that the Referee failed to find as a fact something of which there was no evidence?

This, then, disposes of that portion of counsel's brief devoted to the District Court's failure to set aside the discharge. He took no appeal from the order. He could have taken none. The grounds of the motion are unten-

able and no showing was ever made to support the motion.

IV.

A TRUSTEE IN BANKRUPTCY IS NOT A COMPETENT PARTY TO OPPOSE A DISCHARGE UNTIL HE HAS BEEN AUTHORIZED SO TO DO BY VOTE OF THE CREDITORS AT A MEETING CALLED FOR THAT PURPOSE.

The Bankruptcy Act explicitly provides that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized so to do at a meeting of the creditors called for that purpose.

> Bankruptcy Act (36 Stat. 839) Sec. 14, sub. b.
>
> "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, as such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has, etc. * * *
>
> *Provided that a trustee shall not interpose objections to a bankrupt's discharge until he has been authorized so to do at a meeting of the creditors called for that purpose.*"

There is absolutely *no evidence* that the trustee was ever authorized by a meeting of the creditors to oppose this discharge. There was not even a legally constituted meeting. There is *no allegation* of any such authority in the specifications of objection. The only authority the trustee had was an order of the Referee in Bankruptcy.

The provisions of the act itself are so unequivocal to the effect that a trustee in bankruptcy, before he is competent to oppose a discharge, must first be authorized by the creditors in a legally constituted meeting, as to hardly require the citation of authority. There are, however, many such decisions.

In re Churchill (D. C. Wis.) 197 Fed. 114.
In re Hockman (D. C. E. D. Penn.) 205 Fed. 330.
Remington on Bankruptcy (2d) Secs. 2463½, 572, and 593½.
Loveland on Bankruptcy (4th) Sec. 714.
Collier on Bankruptcy (9th) Page 315.

The objection of the bankrupt (Tr. 100, 101) to any hearing of the matter at the instance of the trustee, who was not a competent party, should have been sustained, and the decision of the District Court so deciding is correct.

A. Specifications of Objection Which Fail to Show the Capacity of the Objecting Party, and That He Is Entitled to Oppose the Application for Discharge Are Fatally Defective, and Present No Issue That Should Be Considered or Determined.

There is no allegation in the specifications of objection (Tr. 12 to 16) to the effect that the trustee was authorized by a meeting of the creditors to oppose this discharge. Lacking such allegation, *they are fatally defective in substance,* and do not state a cause of opposition.

Remington on Bankruptcy (2nd) Sec. 2594.

In re Servis (D. C. Iowa) 140 Fed. 222.
In re Chandler, 138 Fed. 637.
In re Levy (D. C. N. Y.) 133 Fed. 572, 576.
In re Main (D. C. Iowa) 205 Fed. 421.

B. The Specification of Objection Are Fatally Defective for the Further and Independent Reason that All of the Allegations Therein Contained Are Made Upon Information and Belief.

The specifications of objection (Tr. 12) consist *entirely* of allegations made upon information and belief. This is a *substantive* defect.

In re White, 222 Fed. 688.
In re Thomas, 92 Fed. 912.

This, then, is the state of the record. There is a complaint, or specifications of objection, which does not state a cause of action, or objection, first, because the capacity of the objecting party is not shown, and secondly, because all of its allegations are upon information and belief; and it is axiomatic that a valid judgment cannot be predicated upon a void complaint.

There is absolutely no evidence that the trustee was in fact authorized by a vote of the creditors in a legally constituted meeting called for that purpose, as is very clearly required by Section 14b of the act. And lastly, there is the objection of the bankrupt made at the inception of the hearing that the matter should not be proceeded with because the opposing party had no standing

in court. In view of these matters not only is the decision of the District Court granting the discharge correct; any other decision would have been impossible.

V.

THE CLAIMED FALSE STATEMENT WAS FURNISHED THE BANK OF CALIFORNIA SIXTEEN MONTHS BEFORE THE LAST EXTENSION OF CREDIT GRANTED, A PERIOD TOO REMOTE FOR IT TO HAVE BEEN REASONABLY RELIED UPON.

So conclusive is the reason of the trustee's lack of authority to oppose this discharge for its granting that the question of the merits of the case has to a certain extent been minimized. The bankrupt is, however, from the point of view of the evidence alone, clearly entitled to his discharge.

Two charges were made. First, that the bankrupt obtained money from the Bank of California by virtue of a materially false statement in writing; and, secondly, that he destroyed, concealed, or failed to keep books of account with intent to conceal his financial condition.

The bankrupt opened his account with the Bank of California on April 19, 1913, by borrowing $10,000, for which he gave his promissory note payable in ninety days, then furnishing them, as the Referee found, although the evidence was conflicting, with a statement of his financial condition as it existed on December 31st, 1912 (Tr. 102). On July 18, 1913, he went to the bank,

executed a new note for $10,000 payable in ninety days, drew his check for $10,000, with which he paid his old note, which was returned to him marked "Paid" (Tr. 102, 103). On October 18, 1913, this transaction was repeated, and was likewise repeated January 20, 1914, and April 20, 1914 (Tr. 103). The last note was executed on April 20 1914, sixteen months after the date of the written statement, which was December 31, 1912.

Incidentally the evidence shows that the written statement was not referred to or relied on when the bankrupt executed his fifth and last note on April 20, 1914 (Testimony of Mr. Moulton, 103). But even if the statement had been referred to and had been relied on, it cannot be interposed as a bar to a discharge, irrespective of its falsity, for the reason that a creditor has no right to rely on a statement so remote.

In re Mintzer (D. C. N. Y.) 197 Fed. 647.
In re Braverman, 199 Fed. 863.
In re Allendorf (D. C. Iowa) 129 Fed. 981.
In re O'Callaghan (D. C. Mass.) 199 Fed. 662.

A. On Each of the Five Occasions that the Bankrupt Executed His Note to the Bank of California for $10,000 *a New and Separate Loan Was Negoiated. On Each Occasion There Was a Further Extension of Credit for a Definite Time. These Five Notes Cannot Be Regarded As One Transaction.*

In re Waite (D. C. Md.) 223 Fed. 853.

This case establishes the converse of the proposition.

The bankrupts were clients of the National City Bank, This combined with the First National Bank, who thus acquired $22,500 of the bankrupts' paper. *Prior* to the merger the bankrupts had never had any business dealings with the First National. *After* the merger the notes were renewed from time to time, something always being paid on account of the principal, so that the amount due at the time of the bankruptcy was less than the amount due at the time of the merger. From time to time after the merger the bankrupts furnished the First National Bank with written statements which were false. A few days before a note became due the bankrupts would execute a new note and then pay their old note with a check.

The Court denied the bankrupts their discharge, holding that each time a new note was negotiated it was a *separate* and *new* extension of credit, the obtaining of which by virtue of a false statement in writing was such as would bar a discharge, and refused to accept the contention that the whole transaction was in effect one loan.

In the case at bar, the dealings of the bankrupt with the Bank of California cannot be regarded as one loan, but must be considered as five separate transactions; five separate and distinct extensions of credit, *the last of which was on April* 20, 1914, *sixteen months after the claimed false written statement of December* 31, 1912, *a period, as stated, too remote to have been reasonably relied upon.*

VI.

THE EVIDENCE AS TO THE FALSITY OF THE STATEMENT IS INSUFFICIENT TO WARRANT THE FINDINGS OF THE REFEREE.

The specifications of objection allege that the whole of the written statement was false (Tr. 15). There was no attempt to prove the falsity of any of the items save and excepting the liabilities and the value of the merchandise in stock (Tr. 13). The objection was made that the specifications were not specific enough (Tr. 101), which was overruled. So the bankrupt accepted the issue that the whole of the statement was false. Yet there was no attempt to prove the falsity of any but the two items mentioned, namely, the value of the stock in trade and the liabilities.

As to those two items, the evidence, or at least many essential links, upon which the Referee basis his findings as to falsity, consists of *the uncorroborated testimony of a single witness positively denied by the bankrupt.*

In view of the fact that in order to establish his claim the trustee must prove all of the essential elements of obtaining money under false pretenses, which obtaining money from a bank by virtue of a false statement in writing would be

People vs. Haynes, 11 Wend (N. Y) 565.

Penal Code of California, sec. 532,

and in view of the fact that the evidence barring a dis-

charge in bankruptcy must be "clear and satisfactory," "strict," "convincing,"

Hardee vs. Swafford Bros. (C. C. A.) 165 Fed. 588, 590.

In re Howden, 111 Fed. 723, 725.

In re Chamberlain, 125 Fed. 629, 630,

it has been held, that in a proceeding in opposition to a bankrupt's discharge, where the offense charged contains all of the elements of a crime, the uncorroborated evidence of a single witness, when denied, is not sufficient to overcome the presumption of innocence.

Troder vs. Lorsch (C. C. A.) 150 Fed. 710.

> "When a person is charged with all the elements which constitute a heinous crime, although it be only in a civil issue, it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence unless the adverse proofs are so far satisfactory as to be convincing.
>
> "If there were a criminal proceeding the court, in accordance with the usual rule of one witness with unsupported testimony against that of another, would direct the jury that each was neutralized and that acquittal must follow. Although this is not a criminal proceeding, it strikes us that such is the result with the testimony of these two witnesses under the circumstances and the characteristics we have explained."

This decision is the leading case upon the subject and has been cited and approved in

Pennell vs. United States, 162 Fed. 64, 74.

In re Chamberlain, 180 Fed. 304, 307.

Remmers vs. Merchants National Bank, 173 Fed. 484, 488.

Garry vs. Jefferson Bank, 186 Fed. 461, 463.

VII.

THE OBJECTION OF FAILURE TO KEEP BOOKS WITH INTENT TO CONCEAL FINANCIAL CONDITION CANNOT BE RELIED ON BECAUSE OF THE MANNER IN WHICH IT IS PLEADED.

The allegations follow the wording of the statute exactly and are as follows:

> "That said bankrupt with intent to conceal his financial condition has destroyed, concealed or failed to keep books of account or records from which his financial condition might be ascertained." (Tr. 15).

Allegations in the mere words of the statute are insufficient.

> Remington on Bankruptcy, Sec. 2608.
> In re Milgraum & Ost, 129 Fed. 827, 829.

VIII.

THAT THE BAKRUPT FAILED TO KEEP BOOKS OF ACCOUNT WITH INTENT TO CONCEAL HIS FINANCIAL CONDITION WAS FAR FROM PROVEN.

There was no attempt to prove either destruction or concealment. To prove failure to keep proper books of account counsel for the trustee called Mr. Lester Herrick, a certified public accountant, and asked him if, from certain account books lying on a table, which he had previously examined the bankrupt's financial condition could be ascertained. To this the bankrupt objected on the

ground that the books in question had not been shown to be his books of account.

Counsel for the trustee then called the bankrupt and asked him if those were his books of account. He answered that those were some of them, but that there were many, many others (Tr. 52). Counsel then called Miss Wichman, who was the bankrupt's bookkeeper and stenographer at the time of the bankruptcy, and asked her if those were the bankrupt's books. She answered that she did not remember very much about it, but at least the cash book was missing (Tr. 108). It also materialized that for two months previous to the trustee's going into possession the bankrupt's place of business had been under attachment with a keeper in charge (Tr. 108).

Objection to all of the testimony concerning books of account was then *sustained* by the Referee, but was taken for the record.

Notwithstanding that these books of account never were shown to be the books of account of the bankrupt, and notwithstanding his ruling, which was never changed, the Referee rendered a report to the effect that the bankrupt failed to keep books of account with intent to conceal his financial condition.

To prove intent there was nothing. The bankrupt testified fully as to his system of accounts (Tr. 52), which he had used continuously since the year 1900, and the fact that he had used the same system so long, a period

of fourteen years, entirely negatives any fraudulent intent.

In re Idzall, 96 Fed. 314, 316.

The Referee also decided that the bankrupt was not to be excused for failing to account for the absence of books which he claims to have had immediately preceding the bankruptcy.

In the first place this is not the law. It will not be presumed that proper books of account were not kept because the books are not found.

In re Cantor, 26 Am. Ban. Rep, 859, 864.
Collier on Bankruptcy (9th) Page 349.

In the second place in the fact that he had been out of possession of his place of business for two months before his bankruptcy, a keeper being in charge under a writ of attachment (Tr. 108), he did account for their absence.

So much for the claimed "merits of the case," "miscarriage of justice" and other similar phrases one finds in the appellant's brief.

A loan made on a claimed false statement rendered fifteen months before the credit was extended and which not even the bank officials themselves say they referred to or relied on (Tr. 103).

A statement alleged to be false *in toto* and yet of which only two items were attempted to be proven false, and

those by self contradictory uncorroborated testimony absolutely denied by the bankrupt.

A finding of failure to keep books of account with intent to conceal financial condition based upon evidence which even the Referee himself sustained objection to, and in the face of evidence that the same system had been employed for fourteen years.

Specifications absolutely worthless for several reasons and upon which a valid judgment denying a discharge never could possibly have been based.

An objection made at the very beginning of the hearing as to the trustee's right to prosecute the opposition which there was absolutely no excuse for overruling.

"Merits of the case" and "miscarriage of justice" indeed. The only miscarriage of justice was in putting the bankrupt to a long and bitterly contested trial which never should have taken place. The judgment should be affirmed.

Dated, Oakland, California, October 15th, 1917.

Respectfully submitted,

WILDER WIGHT,
Attorney for Bankrupt and Appellee.